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Nos. 95-1649 and 95-9075

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF KANSAS,
Petitioner and Cross Respondent

v.

LEROY HENDRICKS,
Respondent and Cross Petitioner

On Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR CROSS PETITIONER

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SUMMARY OF THE ARGUMENT

This Court has taken care to prevent States from "substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who have proved beyond reasonable doubt to have violated the criminal law." *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). Mr. Hendricks committed criminal acts in 1984 for which he was rightly criminally responsible and for which he was punished. Because, as the State recognizes, it cannot now increase his criminal sentence beyond what the prosecutor agreed to and the court imposed, the State seeks to recast additional criminal punishment in the form of "civil" commitment. Unlike the civil commitment of the mentally ill this Court upheld in *Addington v. Texas*, 441 U.S. 418 (1979), commitment of persons with unspecified "mental abnormalities" for the protection of the community is not an exercise of the State's *parens patriae* authority to provide care and treatment to its citizens. For the same reasons that the Due Process Clause requires this Court to prevent unbridled "confinements for dangerousness" from displacing the criminal law as the ordinary mechanism for depriving persons of their liberty for the protection of society, this Court has recognized that "civil" labels cannot be used to circumvent specific constitutional safeguards, such as the *ex post facto* and double jeopardy prohibitions against increasing Mr. Hendricks' punishment.

Like the juvenile delinquency prosecutions involved in *Breed v. Jones*, 421 U.S. 519, 529 (1975), the consequences of commitment as a sexually violent predator under Kansas law "include both the stigma inherent in such a determination and the deprivation of liberty for many years." Kansas single-mindedly relies on this Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), as authority for the proposition that "state statutes which provide for the civil commitment of sexually dangerous persons with mental conditions for long-term care and treatment are not criminal in nature and do not impose

'punishment' for constitutional purposes." Br. Cross-Resp. at 5. But *Allen* is not so sweeping. Under Illinois law, the State had to forego criminal prosecution in order to commit a sexually dangerous person for treatment, even though it was required to prove a crime beyond a reasonable doubt, so there was no danger that commitment would be used to circumvent constitutional restrictions on criminal prosecution and punishment. The Illinois commitment statute provided a benign alternative to the rigors of criminal sentencing for persons, like Allen, who suffered from mental illness and could benefit from treatment. Kansas barely acknowledges the difference between a statute permitting commitment instead of prosecution, and one designed to extend a sentenced prisoner's confinement like the Kansas SVP Act. Unlike Illinois, Kansas has not "disavowed punishment," and this case cannot be analyzed as if it were the twin of *Allen*.

Kansas agrees with Cross-Petitioner that the Court has customarily looked to the purpose or the effect of a sanction to determine whether a nominally "civil" sanction should be treated as criminal punishment (Br. Cross-Resp. at 15), and makes reference to the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) in assessing whether a statute as a punitive purpose or effect. (Br. Cross-Resp. at 17). Yet rather than attempting to apply these standards, the State retreats behind slogans of deference to state policy choices. This case is not about whether the State has a legitimate interest in protecting the community from potentially dangerous sex offenders, but whether the State can effectuate that interest by imposing additional confinement on persons the State has held criminally accountable and desires to punish. The seven factors listed in *Kennedy v. Mendoza-Martinez* can fairly be distilled into three inquiries: (1) is the sanction one historically used to punish; (2) is the factual predicate for the sanction the commission of a crime; and (3) is the legislature's predominant goal a civil or remedial purpose. The design and implementation of the Kansas SVP Act offer the "clearest proof"

that commitments were intended to be punishment in disguise. Confinement in a prison facility is historically used to punish, and commitment as a sexually violent predator is tied to proof that the person has committed a crime, a condition the Court has long deemed, "significant of penal and prohibitory intent." *Montana Department of Revenue v. Kurth Ranch,* 114 S.Ct. 1937, 1947 (1994). And, no matter how hard the State tries to avoid it, the Kansas Supreme Court's finding that incapacitation, not treatment, was the predominant purpose of the commitment statute is amply supported by the record and entitled to deference. This Court's decisions upholding civil regulatory detention schemes have always involved detention associated with special governmental functions that do not—as the Kansas SVP Act would do —have the potential to displace the criminal law.

ARGUMENT

I. *ALLEN v. ILLINOIS* IS NOT CONTROLLING BECAUSE KANSAS, UNLIKE ILLINOIS, SEEKS TO IMPOSE CONFINEMENT OF SEX OFFENDERS IN ADDITION TO, RATHER THAN INSTEAD OF CRIMINAL PROSECUTION.

Kansas relies almost exclusively on this Court's decision in *Allen v. Illinois,* 478 U.S. 364 (1986), for its analysis of the *ex post facto* and double jeopardy issues presented in the cross petition. But *Allen* does not, as the State would have it, hold *all* "laws providing for the involuntary commitment of sexually dangerous persons are civil in nature." Br. Cross-Resp. at 6. In making that generalization, the State ignores the basic distinction recognized by this Court in *Specht v. Patterson,* 386 U.S. 605, 610 n.7 (1967), between the alternative to criminal prosecution provided by statutes like that examined in *Allen* and the Minnesota statute in *Minnesota ex rel. Pearson v. Probate Court,* 309 U.S. 270 (1939), and those, like the Colorado law at issue in *Specht,* that are used as a form of disposition following a criminal prosecution and conviction. Kansas ignores the Court's rea-

sons for holding the commitment procedure in *Allen* civil for purposes of the Self-Incrimination Clause of the Fifth Amendment: Illinois "disavowed any interest in punishment, provided for treatment of those it commits and established a system under which committed persons can be released after the briefest time in confinement." 478 U.S. at 370. Because none of these things are true of the commitment scheme established by the 1994 Kansas Sexually Violent Predator Act, the Court's holding in *Allen* does not fit this case, and its reasoning, in *Allen* as well as many other cases in which the Court has attempted to differentiate civil from criminal proceedings, leads to the conclusion that commitments under the Kansas statute are criminal, and that Mr. Hendricks' commitment violates the *ex post facto* and double jeopardy clauses.

A. Kansas has not "disavowed any interest in punishment."

Under Illinois law, the prosecutor had the choice to seek a conviction and sentence on criminal charges, or to seek commitment under the Sexually Dangerous Persons Act. Because the prosecutor could not do both, there was no danger, as there is under Kansas law, that commitment could be used to extend the confinement of a sentenced prisoner, or that treatment in a hospital setting would be delayed for years by a period of prison confinement. Illinois, quite literally, disavowed the right to punish those persons it subjected to commitment as Sexually Dangerous Persons. Because only persons who had already been charged with criminal offenses, and who could be proved guilty of at least one beyond a reasonable doubt, were subject to commitment, there was little or no risk that Illinois would use commitment as a substitute for the criminal process. Unlike this case, *Allen* did not present a situation in which the State sought to use a "civil" commitment because it *could not* prosecute and punish in an ordinary criminal proceeding. [For example, there was no claim in *Allen* that the State based its commitment decisions on whether it could prove a sexual offense without the defendant's compelled testimony.]

The State's choice to commit a person it could prosecute established the *bona fides* of its decision to treat rather than to punish.

In *Allen*, the requirement that the State first prosecute and later prove a crime beyond a reasonble doubt in order to commit operated to limit the State's commitment powers to the most dangerous sex offenders, those whose tendencies manifested themselves in punishable conduct. The Illinois commitment statute allowed the State to divert those, like Allen, who suffered from treatable mental illness into a more appropriate form of confinement. But to do this, the State had to forego the opportunity to inflict punishment. In this case, however, the statute is applied to persons whom the State desires to punish further for past conduct, but whom the State cannot openly punish further because of the *ex post facto* and double jeopardy prohibitions. The Kansas statute, unlike the Illinois law in *Allen*, presents the danger, if it is upheld, that nominally civil commitments of dangerous persons will be used as a means of incapacitation instead of the criminal law.

B. The Kansas SVP Act does not require treatment.

The Illinois Supreme Court held that the aim of the Illinois statute before the Court in *Allen* was to offer *"treatment not punishment."* 481 N.E. 2d 690, 694-695 (1985) (emphasis added). This Court undoubtedly gave some deference to the Illinois Court's interpretation of state law, treating it as a presumption that Allen had to overcome. 478 U.S. at 369. By the same token, the Kansas Supreme Court's determination that "the primary objective of the [SVP] Act is *to continue incarceration and not to provide treatment.*" Pet. App. 17a,[1] (emphasis

[1] In reaching that conclusion, the Kansas Court no doubt followed its well settled rules of statutory construction which allow it to, "look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under various constructions suggested." *Brown v. Keill*, 580 P.2d 867, 871 (Kan. 1978). Those factors are very similar to a statutes " 'immediate objective,' its

added), places the burden on the State to show that a court familiar with the background and statutory context of the SVP Act misunderstood the legislature's goal. The State cannot do so because the record convincingly supports the Kansas Supreme Court's view.

Unlike the Illinois provisions which specifically require treatment be designed to effect recovery, the Kansas scheme, far from providing treatment, "finds" that persons targeted are unamendable to treatment (if treatment exists)[2] and that treatment "in a prison setting" is not bene-

'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.' " Which this Court has recognized as being appropriate guides for the consideration of the constitutionality of an enactment. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967).

The State would have the Court ignore the historical and political climate in which the SVP Act was passed. The legislation was proposed by a group formed specifically to keep persons incarcerated after completion of their criminal sentences. The only references to treatment in testimony in the legislative hearings came from persons saying that no meaningful treatment was available. The Attorney General called the SVP Act the most meaningful criminal legislation of the session and the current Attorney General declared that the Act would keep the "animals" off the streets indefinitely.

[2] Kansas grudgingly admits that "treatment programs under the Act are still evolving," (Br. Cross-Resp. at 24). But its discussion of the *habeas corpus* proceeding omits the admission by its own clinical director that he was not fully qualified to direct the program and that committees were receiving "essentially no treatment." J.A. 393. The State's attempt to characterize commitment as mental health treatment is at odds with represenations one of its *amici* has made to a federal court in seeking to modify a consent decree governing treatment programs for sexually dangerous persons. According to the Commonwealth of Massachusetts, "professional opinion concerning the most effective treatment of sexually dangerous persons has also changed fundamentally, so that the premise of the decrees' emphasis on mental health treatment approach is now rejected by leading professionals, and the system devised by the decrees based upon that premise is now seen to be counter therapeutic." Memorandum In Support of Defendants' Renewed Motion to Modify Consent Decrees at 7-8, *King v. Greenblatt*, No. 72-288 (filed November 16, 1994). The Commonwealth supported this motion with an affidavit by the director of its treatment program, who also founded and directed the sex offender

ficial to or appropriate for sex offenders subject to commitment under the SVP Act. Putting to one side for the moment the implications of the latter finding for the prison based "treatment" Kansas has elected to provide to committees under the Act, this finding establishes that Kansas' insistence on sentencing and punishment first, followed by commitment, is incompatible with the goal of treatment. Kansas' decision to delay treatment in favor of punishment, especially in view of the fact that evaluation and treatment were available in the criminal proceeding, K.S.A. 22-3429, 3430, 3431, shows that the Kansas statute is not an ameliorative alternative to prosecution and punishment.

Moreover, although Kansas invokes the "findings" of the trial court that committed Mr. Hendricks and the *habeas* court that refused to release him, it ignores the findings of the Kansas Supreme Court made from the record that, "[I]t is clear that the overriding concern of the legislature is to continue the segregation of sexually violent predators from the public." Pet. App. 16a, and the record itself.[3] The admissions of the program director

treatment program for the State of Washington from 1988-1992. In her affidavit, Dr. Barbara Schwartz asserted that successful sex offender treatment programs are run by corrections agencies, and that "[t]he premise of modern sex offender treatment is that most sex offenders are not mentally ill." Affidavit of Barbara Schwartz, Ph.D. at 8.

[3] The State asks this Court to set aside that finding based upon the determinations by district court judges that treatment is provided. In the first instance, in the face of evidence that no contractor had been retained to provide treatment, that the staff at the facility where persons committed under the SVP Act were to be housed did not have the equipment, training or expertise to provide treatment, J.A. 483,484,552, and that no new staff had been added to provide treatment, J.A. 366-372, the district court found that SRS had established a treatment, J.A. 366-372, the district court found that SRS had established a treatment program *"available perhaps at some time in the future."* J.A. 387 (emphasis added).

That point in the future had not yet arrived when Dr. Charles Befort, Acting Director of the Sexual Predator Treatment Program,

belie the claim that Kansas has "provided for treatment" of persons committed under the SVP Act. To the contrary, the State's enactment of the commitment statute in the face of testimony that it lacked the capacity to provide treatment, its failure to fund treatment and its failure to implement a treatment program even after commitments were ordered under the Act, directly supports the Kansas Supreme Court's view that treatment was "incidental, at best" Pet. App. 16a, to the incapacitative goal of the statute.

C. Kansas has not established a system in which committed persons can be released after the briefest time in confinement.

The possibility that a committed sex offender could be released after only a brief period of confinement bolstered the conclusion that the purpose and effect of the Illinois statute in *Allen* was to treat, not to punish, because it showed that the State was willing to trade a shorter period of confinement for the possibility of enhanced community safety from treatment of persons suffering from genuinely

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testified ten months later in a state *habeas corpus* hearing that Mr. Hendricks and the other committees under the SVP Act were receiving "essentially no treatment". J.A. 393. He elaborated that even though he was the Acting Clinical Director, he did not feel he was fully qualified to be in that position. J.A. 392. He further testified that there were no clinical staff giving treatment to SVP committees other than himself and that he could not give effective treatment because he was the person whose testimony had resulted in their involuntary confinement. J.A. 392-397. Dr. Befort also testified that on the sporadic occasions when a group session was held, they were primarily gripe sessions about the lack of treatment and did not address sexual deviancy issues. J.A. 398-399.

Dr. Befort testified that the committees were receiving "ward milieu" therapy, *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 569 (1975), which he testified was totally inadequate by itself. J.A. 407, 417. Dr. Befort concluded his testimony by telling the court, "In terms of needed treatment relevant to the sexual deviancy, that hasn't been delivered yet." J.A. 420. "Today it is still not available." J.A. 421. In spite of such evidence, the district court concluded that the allegation that *no treatment* was being provided to SVP Act committees was not true. J.A. 453, 454.

treatable mental illnesses. There is no such tradeoff under the Kansas statute, because prosecution and punishment precedes commitment. In an attempt to overcome that deficiency, the State argues that confinement under the SVP Act is not intended to be for life. Br. Cross-Resp. at 8. In making that assertion, the State simply ignores the evidence that the SVP Act is designed to produce legnthy, even permanent confinement. The legislature in its findings recognizes the necessity for "very long term" K.S.A. 59-29a01, confinements and the "poor" prognosis in a prison setting, K.S.A. 59-29a01, which is what the State has provided. And, long term confinement is certainly what the legislature expected to happen. Prior to passing the Act, the legislature was warned by both its opponents and proponents that few if any mental health professionals would be willing to make the required certification that there was probable cause to believe that a committee was "safe to be at large", especially under an all or nothing statute which, unlike that in *Allen*, provided no mechanism for release, supervision and treatment in the community. While the Act provides for a committee to petition for release without such a certification, the procedure is such that the Kansas Supreme Court found "release through this avenue seem[s] improbable." Pet. App. 10a.

None of the features this Court found dispositive in *Allen* are applicable to the Kansas Sexually Violent Predator Act. The State's argument therefore boils down to its erroneous claim that *Allen* necessarily determined any scheme for the commitment of sex offenders to be civil, regardless how the statute operates.

II. THE PURPOSE AND EFFECT OF THE KANSAS SVP ACT IS PUNITIVE

Because, as we have shown, *Allen v. Illinois* involved a fundamentally different statute and does not govern this case, the Court must expand its focus to include dozens of other decisions addressing the distinction between civil and criminal proceedings. We agree with the State that this Court has used a two step approach in determining

whether a sanction is subject to constitutional restrictions applicable to criminal proceedings. Br. Cross-Resp. at 15. The first step is to determine whether the legislature intended to create a civil or a criminal sanction. *United States v. Ursery*, 116 S.Ct. 2135, 2142 (1996). Even though the Kansas legislature placed a "civil" label on the SVP Act, that "does not foreclose the possibility it has a punitive character." *Montana Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937, 1945 (1994). The question then becomes "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial sanction." *Ursery*, 116 S.Ct. at 2142 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (internal quotation omitted). Because this analysis turns on "the character of the actual sanctions imposed on the individual by the machinery of the state", *United States v. Halper*, 490 U.S. 435, 447 (1989), "[I]n making such an assessment, 'the labels 'criminal' and 'civil' are not of paramount importance." *Kurth Ranch*, 114 S.Ct. at 1945 (quoting *Halper*, 490 U.S. at 447).[4]

From its decision in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), to *Halper* and *Kurth Ranch* the Court has consistently recognized that, "the Constitution constrains the State's ability to denominate proceedings 'civil' and so dispense with the criminal procedure protections embodied in the Bill of Rights." *Kurth Ranch*, 114 S.Ct. at 1953 (O'Connor, J., dissenting). This Court has recognized that some sanctions are inherently punitive. *See Kurth Ranch*, 114 S.Ct. at 1952 (O'Connor, J., dissenting) (quoting *United States v. Ward*, 448 U.S. 242, 248-249 (1980)) ("Some governmental exactions

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[4] The State cites *Ursery*, at 116 S.Ct. at 2148 n. 3, as authority for its assertion that affixing a civil label on an act "establishes a presumption" that it is civil. That assertion ignores the plain language of the note which clearly relies on the fact that a forfeiture is designated as civil *"and proceeds in rem"* to establish such a presumption Clearly, proceedings under the SVP Act are not *in rem*.

are so punitive they may be imposed only in a criminal proceeding"). In *Breed v. Jones*, 421 U.S. at 529, the Court concluded it was "simply too late in the day," to treat as civil for double jeopardy purposes, "a proceeding whose object is to determine whether [the person] has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." Because the SVP Act meets this standard, it can be considered civil only if the State can show, as Illinois did in *Allen*, that it has "disavowed any interest in punishment." 478 U.S. at 370. Assertions that an objectively punitive sanction is really "ciivl" because it is for the purpose of treatment should, as the Court said of the juvenile process in *In re Gault*, 387 U.S. 1, 21 (1967) "be candidly appraised . . ." *quoted in Breed v. Jones*, 421 U.S. at 529.

In our opening brief on the cross-petition, we suggested a streamlined version of the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), test, which distills its seven factors [6] to three: (1) whether the factual predicate for the sanction is a crime; (2) whether the sanction takes a form that was historically used as punishment; and (3) whether legislature's predominant purpose is a non-punitive goal, such as treatment of the mentally ill, rather than a punitive goal such as incapacitation. The first of these factors combines the question whether *scienter* is required with the question whether the conduct is already a crime, because *scienter* historically distinguished crimes from

[6] The seven factors are, "Whether the statute involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it applies is already a crime, whether an alternative purpose to which it may be rationally connected is assignable for it, and whether is appears excessive in relation to the alternative purpose assigned." 372 U.S. at 168, 169.

civil wrongs. Thus a *scienter* requirement was evidence that the factual predicate for a sanction was a crime, even if the conduct did not actually appear in the penal code.[6] The second factor combines the generally trivial question whether the sanction involves an affirmative disability or restraint, with the important question whether the sanction is historically used to punish. History is important for two reasons. First, if a sanction is historically used to punish, it is likely that the Framers of the Constitution thought proceedings leading to the imposition of the sanction should be subjected to the restraints of provisions such as the double jeopardy and *ex post facto* clauses. Second, the historical association of a sanction with punishment makes it likely that, regardless of the label affixed by the legislature, it will be understood by the legislature, the community, and the person upon whom it is imposed as punishment. If so, the label is meaningless and should be disregarded.

The third factor in the inquiry we propose combines the three *Kennedy* inquiries into purpose. There is at times a substantial overlap between purposes served by civil and criminal law enforcement. Some of the traditional goals of criminal law, deterrence, rehabilitation, incapacitation and retribution have been noted by this Court to serve remedial and regulatory purposes as well. This Court recently said in *Bennis v. Michigan*, 116 S.Ct. 994,

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[6] At common law, a *scienter* requirement was one of the principal features distinguishing a crime from the overlapping tort. *See* 3 William Holdsworth, *A History Of English Law* 373-374 (1996 reprint) (5th ed. 1942); 2 Bracton, *On The Laws And Customs Of England* 289 (Woodbine ed.) (1968). For this reason, when a statute requires proof of *scienter* even though there is no such offense in the criminal code, a sanction is likely to be deemed criminal. *See e.g., Child Labor Tax Case*, 259 U.S. 20, 37 (1922) (Congress cannot evade restrictions on its regulatory power over commerce by styling a penalty with a *scienter* requirement a tax.) *Scienter* remains an important hallmark of criminal liability. *See Morrisette v. United States*, 342 U.S. 246 (1952); *Liparota v. United States*, 471 U.S. 419, 426 (1985).

1000 (1996), that deterrence may be an objective of a civil enforcement scheme. Rehabilitation, one of the goals of the Kansas sentencing at the time of Mr. Hendricks 1984 conviction, K.S.A. 21-4601, is also a well recognized goal of true "civil commitments" for treatment.

Incapacitation has historically been recognized as a goal of criminal punishment. *See* 4 William Blackstone, *Commentaries on The Common Laws of England 10* (21st ed. 1844); 1 Francis Wharton, *A Treatise on the Criminal Law* § 2 at (28th ed. 1880). On the other hand, incapacitation is also recognized as a goal of hospitalization of the dangerously mentally ill, *Addington v. Texas,* 441 U.S. 418 (1979), and the temporary "regulatory" confinement of persons accused of serious crimes and found to be very likely to commit new offenses while pending trial. *United States v. Salerno,* 481 U.S. 739 (1987).

Even retribution is encountered in civil proceedings as the reason for awarding punitive damages. *BMW v. Gore,* 116 S.Ct. 1589 (1996) ("[p]unitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition"); *Browning-Ferris Industries v. Kelco Disposal,* 492 U.S. 257, 275 (1989) ("punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law"). Therefor, an examination of the purpose of the sanction alone is not a sufficient indicator of how it should be characterized in determining whether constitutional protections applicable to criminal prosecutions should be applied. Instead, as in *Allen,* a genuine traditional *parens patriae* goal such as the treatment of the mentally ill justifies classifying a statutory scheme as civil, even when it shares many attributes of a criminal proceeding.[7]

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[7] The reader is referred to a more detailed discussion of these issues found in the *Amicus Curiae* brief filed by the National Association of Criminal Defense Lawyers.

A. Incapacitation is not a "civil" purpose.

Kansas erroneously implies that because incapacitation for community safety is compatible with civil or regulatory proceedings, that an incapacitative purpose is civil rather than criminal. But incapacitation, as Justice Kennedy recognized in his dissenting opinion in *Foucha v. Louisiana*, has long been a hallmark of criminal punishment. 504 U.S. at 99. The protection of community safety and deterrence of crime by incapacitating dangerous offenders is widely recognized in treatises and statutes as an important, if not the most important goal of punishment 1 Charles E. Torcia, *Wharton's Criminal Law* § 1 at 2-3 (15th ed. 1993); National Research Council, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (1978);* Herbert Packer, *The Limits of the Criminal Sanction* 50-51 (1968); Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* 9 (1972), K.S.A. 21-4601. As the Court recognized in *Foucha*, if "civil" proceedings could be used to imprison dangerous people, there would be little use for the criminal law. 504 U.S. at 83. None of this Court's decisions upholding incapacitative confinement support the unlimited use of civil proceedings to protect the community. To the contrary, the Court has confined its acceptance of incapacitative confinement to limited circumstances in which incapacitation is tied to another governmental power, such as the legislature's plenary authority over persons illegally in the country, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952), the court's power over persons under its jurisdiction before trial, *United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984), or the *parents patriae* power of the State over the mentally ill. *Addington*.

B. The factual predicate for commitment is the commission of a crime.

The State ignores this Court's recent observation in *Montana Dept. of Revenue v. Kurth Ranch*, that tying a sanction to an *arrest* for a crime is "significant of penal and prohibitory intent." *Kurth Ranch*, 114 S.Ct. at 1947 (citation omitted). *See also United States v. U.S. Coin & Currency*, 401 U.S. 715, 721-722 (1971); *United States v. LaFranca*, 282 U.S. 568, 575 (1931); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922); *Ursery*, 116 S.Ct. at 2144. *A fortiori*, requiring proof beyond a reasonable doubt that a person committed a crime as a precondition to imposing a sanction is evidence the sanction is intended to punish. Although the Court in *Allen* concluded that this requirement under Illinois law did not make commitments criminal, it did so in a markedly different context. In *Allen*, the requirement of proof that the person committed a crime narrowed the class of persons subject to commitment *instead of prosecution* prevented the abuse or overuse of the commitment power, while here the effect is to limit the commitment to persons already prosecuted and confined by the State, persons whom the State has evinced a desire to punish.

The State contends that its case does not begin and end with the proof of a criminal charge or conviction. To the contrary, that is exactly all the State is required to prove because of the definition of "mental abnormality". The State proves this element, which it now refers to as a "mental condition" in circular fashion by using the past criminal act to both establish the existence of the condition which then has as part of its definition the possibility that the act will be repeated in the future. Thus the conviction of a sex offense, the "mental abnormality" and the potential dangerousness are all proven simply by proof of

a criminal act for which the person has already been punished.

C. Confinement in a prison facility is historically used to punish.

Confinement of a person following a finding that he has committed a violation of the criminal law is historically viewed as punishment. In the context of dealing with sexual offenders, in *Specht v. Patterson*, 386 U.S. 605, 608, 609 (1966), this Court recognized that imprisonment of a sexual psychopath after conviction was "criminal punishment even though it is designed not so much as retribution as it is to keep the individual from inflicting harm." There is no reason for the Court to reach a different conclusion here. Contrary to the State's reasoning, the difference between *Allen* and *Specht* is that Illinois disavowed any interest in punishment and abandoned criminal prosecution while the Colorado statute, similar to a recidivist sentencing provision, simply allowed for extended incarceration following conviction.

The State correctly states that there is historical precedent for confinement "for safe custody, and not for punishment" of persons whose crimes resulted from "madness" and the "furiously mad" who required immediate confinement in order to stop or prevent acts of violence. Commitments in such situation, which clearly are an exercise of the state's *parens patriae* powers, provide no support for a commitment under the SVP Act because, unlike in the first instance, Mr. Hendricks' criminal actions did not result from insanity. He was responsible for his actions which led to his plea and the State acknowledged that responsibility when it entered into negotiations with him and sentenced him on the convictions. Nor does it matter in relations to him what the state can do to or with the "furiously mad" or "furiously insane" who are out of control and in need of short term confinement because he is not

mentally ill. Therefore, the State's reliance on the cited authorities for the proposition that long term confinement in a prison facility is not punishment is clearly misplaced.[8]

The State's *amici* Menninger Foundation, American Alliance for Rights and Responsibilities, *et al.*, addressing the due process issue, attempt to persuade the Court that because confinement of the dangerously disturbed for the protection of themselves and others was widespread early in our country's history, confinements under the SVP Act should be sanctioned today. While it may be true that commitments which would not be permitted under today's standards occurred, they were still motivated by the *parens patriae* concern of caring for those unable to care for themselves, even if nothing we would currently consider treatment was provided. The fundamental reason why that history does not support the SVP Act is because the commitments cited did not follow the commission of criminal conduct by mentally responsible persons. Confinement imposed for such conduct was and is punishment.

D. Confinement under the SVP Act cannot be adequately supported as providing treatment, rather than punishment.

The final factor in our proposed test is whether the sanction is adequately explained by a regulatory or remedial purpose, rather than punishment. In this portion, we are concerned with whether the sanction serves the traditional aims of punishment, retribution and deterrence, which must be viewed in the broad sense of promoting

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[8] The State further attempts to establish that, historically, persons of "ill fame" could be required to post bonds sufficient to compensate others for harm they might do or remain in custody as a means of preventive detention. As authority for that proposition, this Court's opinion in *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806) (Marshall, C.J.), is cited. A careful reading of that case clearly indicates that the Court considered it a criminal proceeding, and the requirement of posting a bond was akin to a condition of probation rather than an order for preventive detention.

crime prevention. Incapacitation is a form of specific deterrence and has long been recognized by this Court as one of the purposes of criminal punishment. *United States v. Brown*, 381 U.S. 437, 458 (1965). The Kansas Supreme Court found after examining the language of the SVP Act, the context in which it was passed and the subsequent treatment, or more correctly the lack thereof, of persons committed under its provisions that it is "clear that the primary objective of the Act is to continue incarceration and not provide treatment." Pet. App. 17a.

The State contends that there is no evidence that the committees under the SVP Act are treated like prisoners. To the contrary, they are housed in a DOC facility which also houses persons who are being punished because they committed violations of the criminal law. They are segregated from persons who have been civilly committed for treatment of mental illness and, unlike such persons, they are subjected to criminal prosecution if they leave the facility. K.S.A. 21-3810. Further evidence that SVP Act committees are treated like prisoners was provided by the fact that at the state *habeas corpus* hearing. Mr. Hendricks and the other committees were forced to set through the hearing in jail garb confined by belly chains, ankle chains and handcuffs, a procedure unheard of in a true civil commitment hearing. Transcript of Habeas Corpus Hearing p.86.

The Kansas Court further found, based no doubt on the State's expert's testimony, that "Hendricks is not mentally ill and the crimes for which he was imprisoned were not the result of mental illness." Pet. App. 20a. The State does not cite one bit of evidence contrary to that finding. Because Mr. Hendricks is not mentally ill, the State cannot rely on incapacitation under its *parens patriae* powers to confine him for treatment as permitted by *Addington*. Without such a justification, the State seeks to rely on the regulatory goal of protecting the community which was recognized by this Court in *United States v. Salerno*, 481

U.S. 739 (1987). While *Salerno* allows pre trial detention in connection with the criminal process involving the most serious crimes, this Court emphasized that the detention permitted was strictly limited in duration. 481 U.S. at 747. Further, this Court refused to extend the use of regulatory detention permitted in *Salerno* to allow for indefinite long term commitment based upon a perception of dangerousness, such as provided for by the SVP Act, in *Foucha v. Louisiana*, 504 U.S. 71 (1992). If the bulkhead against such "civil" confinements is removed, there will be nothing to prohibit the logical progression from incarcerating "sexually violent predators" to taking away the liberty of any group that falls out of favor with the legislature, and is "found" by that body to pose a risk of engaging in undesirable conduct at some unspecified point in the future. Our society as we know it, in which "liberty is the norm" *Salerno*, 481 U.S. at 755, could not survive such unbridled "excited action by the States". *Cummings v. Missouri*, 71 U.S. at 322.

CONCLUSION

The judgment of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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